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No. 634

In the Supreme Court of the United States

OCTOBER TERM, 1952

DAVID DAUBE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (R. 8–36) is reported in 59 F. (2d) 842. The supplemental opinion of the Court of Claims (R. 43–47) is reported in 1 F. Supp. 771.

JURISDICTION

The judgment of the court below was entered July 5, 1932. (R. 42.) Motion for new trial was overruled November 14, 1932. (R. 43.) The petition for a writ of certiorari was filed January 23, 1933. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an agreement by the petitioner that the amount of an overpayment of his 1918 tax should be credited by the Commissioner against a deficiency of a partnership for 1917, authorized the Commissioner to make such credit after the time for collection of the deficiency from the partnership had expired.

2. Whether petitioner may recover the amount of an overpayment of his tax for 1919 as on an account stated when no such ground of recovery was pleaded.

STATEMENT

The findings of the Court of Claims may be summarized as follows (R. 8–11):

During the period involved the petitioner was a member of the partnership of Westheimer & Daube, doing business in Ardmore, Oklahoma. (R. 8.) On June 16, 1919, petitioner filed with the appropriate Collector his individual income-tax return for the calendar year 1918, showing a tax liability for that year of $72,807.41, which was assessed and paid without protest. (R. 8.) In April, 1922, the partnership of which petitioner was a member executed a waiver of assessment for the year 1917, which was signed by the Commissioner. (R. 8, 9.) This waiver expired April 1, 1924. (See R. 13.) On November 10, 1923, the Commissioner mailed to the petitioner a statement which showed that the Commissioner had found additional taxes

due from petitioner for the years 1916, 1917, and 1920, that for the year 1918 there had been an overassessment in the amount of $22,151.88 and for the year 1919 an overassessment in the amount of $2,628.26, and that there was altogether a net overassessment of $13,502.90. (R. 9.) On January 26, 1924, the Commissioner signed an assessment list for the district of Oklahoma in which the additional assessments above referred to appeared. (R. 9.) On January 31, 1924, the Commissioner signed a schedule of overassessments which showed overassessments in favor of petitioner for the years 1918 and 1919 in the amounts referred to above. (R. 9.) The schedule was sent to the Collector with instructions to examine the taxpayer's accounts and to apply the overpayment as a credit against any taxes due. (R. 9.) The Collector entered a credit of $11,277.24 of the overpayment of 1918 taxes against additional assessments for 1916, 1917, and 1920 taxes, signed the schedule, and returned it to the Commissioner. (R. 9.) The validity of this credit is not contested by the petitioner as it was made in time as extended by waiver. Along with the schedule of overassessments the Collector forwarded to the Commissioner a schedule of refunds and credits, dated February 27, 1924, which listed as refundable to petitioner $10,874.64 of taxes paid for the year 1918, and $2,628.26 of taxes paid for the year 1919. (R. 9, 10.) On February 23, 1924, the petitioner and other members of the partnership each signed

an instrument which recited that the partnership had been assessed an additional excess-profits tax for the year 1917 in the sum of $53,012.47, and authorized and requested the Commissioner "to apply and credit the amount refundable to each and all of the individual members of said partnership for 1918 against the additional tax assessed against said partnership for the year 1917 and this agreement to be taken and accepted as full and complete authority therefor." (R. 10.) On March 29, 1924, the Commissioner made the additional assessment against the partnership for the year 1917, as he had by letter of February 11, 1924, informed the partnership he would do. (R. 10.) Also, on March 29, 1924, the Commissioner signed an approval of the schedule of refunds and credits which he had received from the Collector, and, in spite of the fact that the agreement of the partners requesting him to apply overpayments to the additional assessment against the partnership was on file, the Commissioner on the same day authorized payment to the petitioner of the amount shown by the schedule to be refundable. (R. 10.) On April 23, 1924, a check was issued for $13,502.90, the amount of the overassessment, and was forwarded to the Collector for delivery to the petitioner. (R. 10.) The Collector, however, returned the check to the Commissioner without delivering it to petitioner. (R. 10.) On July 28, 1924, the Commissioner by letter instructed the Collector to apply the sum of $13,502.90 (the

total balance of petitioner's overassessments for 1918 and 1919) upon the taxes outstanding against the partnership for the year 1917. (R. 11.) The Collector made such application accordingly. (R. 11.)

On February 26, 1930, petitioner filed separate claims for refund for the years 1916, 1917, and 1918. (R. 11.) One of the claims was for the sum of $13,502.90, which amount included the overassessment for 1918 of $10,874.64 and the overassessment for 1919 of $2,628.26. (R. 11.) No action on these claims was taken by the Commissioner. (R. 11.)

No separate claim for refund for the year 1919 was ever filed by petitioner.

On March 28, 1930, petitioner brought an action in the Court of Claims to recover the sum of $24,780.14, with interest, but as noted above, abandoned part of the claim, and sought to recover the overassessment for the year 1918, $10,874.64, and the overassessment for the year 1919, $2,628.26, a total of $13,502.90, with interest. (R. 12.) The basis of the suit was that the action of the Commissioner in crediting the overpayments against taxes due from the partnership for the year 1917 was unlawful because the collection of 1917 taxes was barred by the statute of limitations after April 1, 1924, when the waiver of assessment expired. (R. 4, 12.) The Court of Claims denied recovery and dismissed the petition. One judge concurred in the result as to the overassessment for 1918, but

dissented as to the overassessment for 1919. (R. 27.)

ARGUMENT

I

The petitioner contends that the Court of Claims erred in holding that the Commissioner's action in crediting his 1918 overassessment against the additional tax liability of the partnership for 1917 was authorized by the agreement of February 23, 1924, asserting that this agreement did not authorize the making of such credit after the statutory period for collection of the partnership tax had expired. The agreement contained no express provision with regard to the time within which the credit might be made. By its terms the Commissioner was

> authorized and requested to apply and credit the amount refundable to each and all of the individual members of said partnership for 1918 against the additional tax assessed against said partnership for the year 1917 and this agreement to be taken and accepted as the full and complete authority therefor. (R. 40.)

We believe that the court below correctly concluded that the Commissioner was not constrained by this agreement to make the authorized credit before the time for collection against the partnership expired. Provisions in the Revenue Acts for the time within which a "credit" may be made have no application, for this was not a credit against the taxpayer's liability, but a separate agreement providing for the application of sums due to him, to

the liability of another. Such an agreement is not dealt with in the Revenue Acts and its proper effect must depend upon its own terms, which, as stated, did not limit the time within which the Commissioner could act under it. The reference to the separate claim for refund filed by petitioner in connection with the same taxes in the penultimate paragraph of the agreement (R. 40) does not, as petitioner contends, indicate that the Commissioner's authority under the agreement was to expire at the end of the statutory period for collection. The paragraph in question shows that the sole purpose of the claim for refund was to protect the taxpayer in the event the Commissioner should conclude that the law did not permit him to apply an overpayment of an individual's tax against a deficiency of the partnership. Obviously it was not, as petitioner contends, an ultimatum to the Commissioner to make the application within the short time remaining before the statute would run.

The agreement here involved was apparently designed to benefit the petitioner by relieving the partnership from demands for payment in cash of a large part of its deficiency. The petitioner has obtained the benefit of the agreement and, even if the meaning of its provisions were doubtful, should not be heard to contend for a strained construction of its terms after the Commissioner has relied upon it and the period for collection of the partnership tax has been allowed to expire. (Cf. *Naumkeag*

Steam Cotton Company v. *United States,* C. Cls. No. L–327, decided January 9, 1933, not yet reported; *Ralston Purina Company* v. *United States,* C. Cls. No. L–506, decided June 6, 1932, not yet reported.)

Petitioner's contention that the result reached below conflicts with the intent of Congress as reflected in the rejection of the proposed amendment No. 262 to the Revenue Law of 1932 is without merit. That amendment, which is set forth on pages 7–8 of petitioner's brief, clearly related to "credits" in the ordinary sense (that is, against the same taxpayer's liability) and not to extra-statutory agreements between the taxpayer and the Commissioner.

The question presented as to the propriety of the Commissioner's application of petitioner's overassessment for 1918 against the partnership liability involves only the interpretation of a particular agreement which has been properly construed below. There is no conflict of decisions on the question, and it obviously does not merit review by this Court.

II

The petitioner also seeks review of the decision below denying recovery of petitioner's overassessment for the year 1919, which was also applied by the Commissioner to the partnership liability. Apparently conceding that there was no timely claim for refund which would permit maintenance

of the suit as one for taxes wrongfully collected and withheld, petitioner now asserts the right to recover on an account stated. The court below held that no such ground for recovery was pleaded (R. 25) and that, in any event there was no basis for recovery on that theory. Examination of the petition in the court below clearly shows that petitioner made no attempt to plead an account stated and it does not appear that there was any request to amend the petition. There is therefore no basis for considering this contention of petitioner.

Petitioner appears to rely on the signing of the schedule of refunds and credits as constituting an account stated. Both the record and the opinion below imply that the Commissioner signed the schedule of refunds and credits by mistake. (R. 10, 14, 15, 23, 24.) The failure of petitioner to plead an account stated can not be disregarded, for it is apparent that the case below was tried on the basis of the pleadings as framed, and the Government can not now be expected to meet a claim to which the proofs were not directed. While the court below placed its decision on this question in part upon the ground that even disregarding the form of the pleadings, there was, upon the facts, no account stated, we deem it unnecessary to discuss the merits of the question for we believe it can not be considered on this record.

There is no basis for petitioner's claim that there is a conflict between the decision below and *Bonwit-*

Teller & Co. v. *United States,* 283 U. S. 258, and *Wm. J. Friday & Company* v. *United States,* 61 F. (2d) 370 (C. C. A. 3d). In the *Bonwit-Teller case* this Court held that the cause of action arose upon the delivery to the taxpayer of a certificate of overassessment, and in the *Friday case* the *Bonwit-Teller* decision was interpreted as requiring the taxpayer to "aver and prove as a substantive material fact" delivery of such certificate in order to prevail. Here the delivery of a certificate of overassessment was neither pleaded, proved, nor found. There is no basis in the record for review of the question in this case.

CONCLUSION

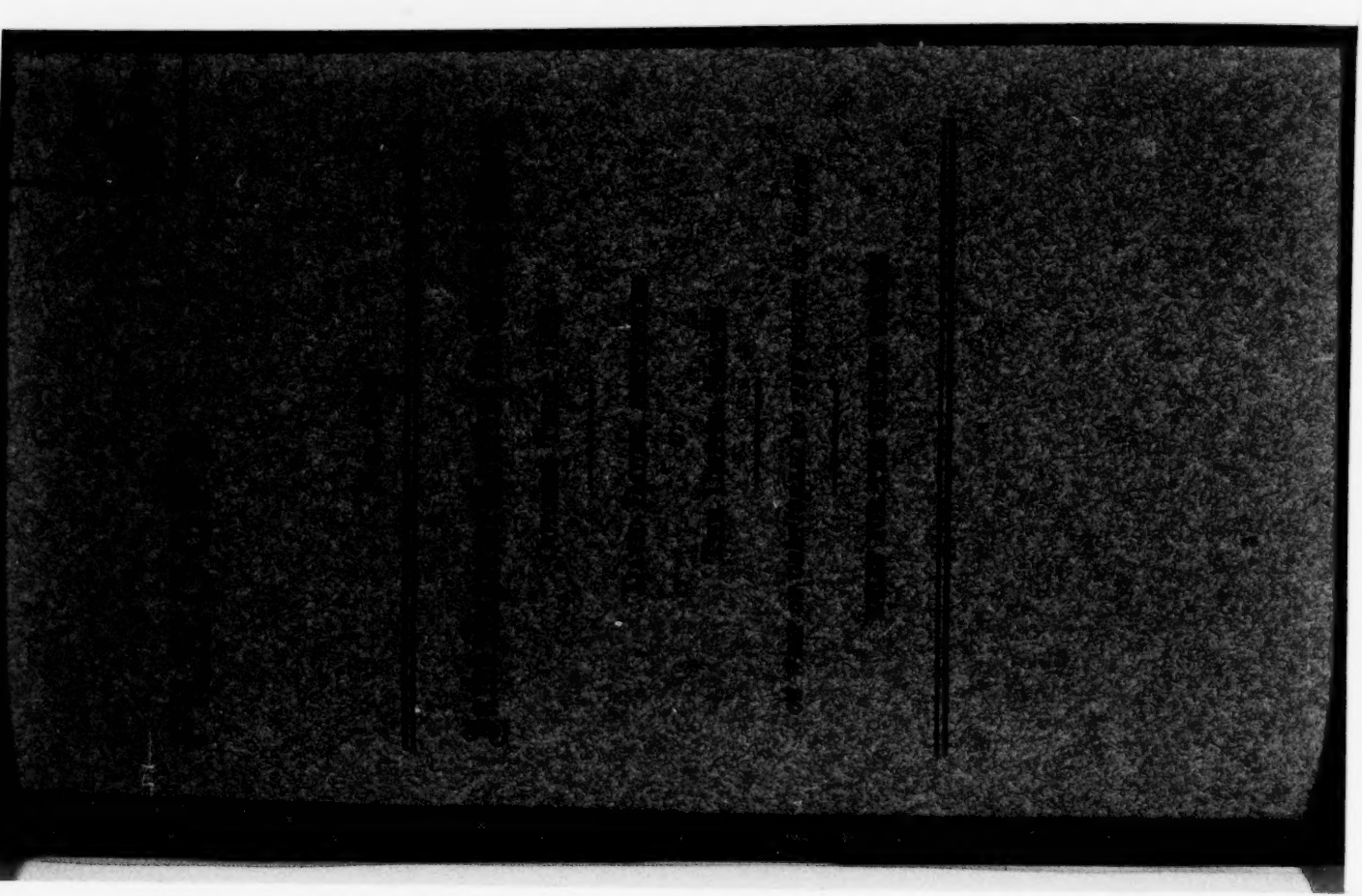
The decision of the court below was correct. There is no conflict of decisions and, upon this record, no question worthy of review is presented. The petition should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
WHITNEY NORTH SEYMOUR,
Special Assistant to the Attorney General.
CHARLES F. KINCHELOE,
H. BRIAN HOLLAND,
J. R. FILLMAN,
LISLE A. SMITH,
Attorneys.

FEBRUARY, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933



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JURISDICTION

The judgment of the court below was entered July 5, 1932 (R. 42). Motion for new trial was overruled November 14, 1932 (R. 43). The petition for certiorari was filed January 23, 1933, and granted March 4, 1933, " limited to the question raised by the assessment for the year 1919." The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether an account stated was pleaded.

2. Whether under the circumstances of this case there may be recovery on an account stated.

3. Whether, if there was an account stated, there may be recovery in the absence of a timely claim for refund.

STATUTES INVOLVED

The applicable provisions of the statutes involved are contained in Appendix, *infra*, pp. 29–22.

STATEMENT

The findings of the Court of Claims may be summarized as follows (R. 8–11):

During the period involved the petitioner was a member of the partnership of Westheimer & Daube, doing business in Ardmore, Oklahoma (R. 8). On June 16, 1919, petitioner filed with the appropriate Collector his individual income-tax return for the calendar year 1918, showing a tax liability for that year of $72,807.41, which was assessed and paid without protest (R. 8). In April 1922 the partnership of which petitioner was a member executed a waiver of assessment for the year 1917, which was signed by the Commissioner (R. 8, 9). This waiver expired April 1, 1924. (See R. 13.) On November 10, 1923, the Commissioner mailed to the petitioner a statement which showed that the Commissioner had found additional taxes due from petitioner for the years 1916, 1917, and 1920, that for the year 1918 there had been an overassessment in the

amount of $22,151.88 and for the year 1919 an overassessment in the amount of $2,628.26, and that there was altogether a net overassessment of $13,502.90 (R. 9).

On January 26, 1924, the Commissioner signed an assessment list for the district of Oklahoma in which the additional assessments above referred to appeared (R. 9). On January 31, 1924, the Commissioner signed a schedule of overassessments which showed overassessments in favor of petitioner for the years 1918 and 1919 in the amounts referred to above (R. 9). The schedule was sent to the Collector with instructions to examine the taxpayer's accounts and to apply the overpayment as a credit against any taxes due (R. 9).

The Collector entered a credit of $11,277.24 of the overpayment of 1918 taxes against additional assessments for 1916, 1917, and 1920 taxes, signed the schedule, and returned it to the Commissioner (R. 9). The validity of this credit is not contested by the petitioners, as it was made in time as extended by waiver. Along with the schedule of overassessments, the Collector forwarded to the Commissioner a schedule of refunds and credits, dated February 27, 1924, which listed as refundable to petitioner $10,874.64 of taxes paid for the year 1918, and $2,628.26 of taxes paid for the year 1919 (R. 9, 10).

On March 29, 1924, the Commissioner made the additional assessment against the partnership for

the year 1917, as he had by letter of February 11, 1924, informed the partnership he would do (R. 10). Also, on March 29, 1924, the Commissioner signed an approval of the schedule of refunds and credits which he had received from the Collector, and on the same day authorized payment to the petitioner of the amount shown by the schedule to be refundable (R. 10). On April 23, 1924, a check was issued for $13,502.90, the amount of the overassessment, and was forwarded to the Collector for delivery to the petitioner (R. 10). The Collector, however, returned the check to the Commissioner without delivering it to petitioner (R. 10).

On July 28, 1924, the Commissioner by letter instructed the Collector to apply the sum of $13,502.90 (the total balance of petitioner's overassessments for 1918 and 1919) upon the taxes outstanding against the partnership for the year 1917 (R. 11). This instruction was given because the petitioner and other members of the partnership had on February 23, 1924, signed an agreement which authorized the Commissioner to credit the amount refundable to the individual partners for the year 1918 against the additional tax assessed against the partnership for the year 1917 (R. 10). The Collector made such application accordingly (R. 11).

On February 26, 1930, petitioner filed separate claims for refund for the years 1916, 1917, and 1918 (R. 11). One of the claims was for the sum of

$13,502.90, which amount included the overassessment for 1918 of $10,874.64 and the overassessment for 1919 of $2,628.26 (R. 11). No action on these claims was taken by the Commissioner (R. 11). No separate claim for refund for the year 1919 was ever filed by petitioner.

On March 28, 1930, petitioner brought an action in the Court of Claims to recover the sum of $24,780.14, with interest, but as noted above, abandoned part of the claim, and sought to recover the overassessment for the year 1918, $10,874.64, and the overassessment for the year 1919, $2,628.26, a total of $13,502.90, with interest (R. 1). The basis of the suit apparently was that the action of the Commissioner in crediting the overpayments against taxes due from the partnership for the year 1917 was unlawful because the collection of 1917 taxes was barred by the statute of limitations after April 1, 1924, when the assessment waiver expired (R. 4, 12). The Court of Claims denied recovery and dismissed the petition. One judge dissented as to the overassessment for 1919, but concurred as to the overassessment for 1918 (R. 27).

The petition for certiorari was granted limiting review to the question presented by the assessment for the year 1919. It may be conceded for present purposes that the Commissioner's action in applying the overpayment for 1919 to the partnership liability was unauthorized.

SUMMARY OF ARGUMENT

The petitioner failed to plead a cause of action on an account stated in its petition in the court below. Recovery upon that ground was first urged in argument. There are no facts alleged in the petition on which a judgment on this theory could be based. The question should not be considered in this case. The defect in pleading should not be disregarded, since it obviously induced the defendant not to make proof of mistake which it otherwise might have done.

If the defective pleading could be disregarded, on the merits there is no basis for recovery on an account stated against the United States. Under *Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, an action arises upon the delivery to the taxpayer of the Commissioner's certificate of overassessment, as an account stated. No certificate of overassessment was delivered to the petitioner here. Upon principle, nothing short of the delivery of a certificate of overassessment can constitute an account stated. The Commissioner's approval of the schedule of refunds and credits, upon which petitioner relies, was not communicated to the petitioner, and at least until delivery of a certificate of overassessment, the Commissioner retains authority to change his action. No liabilty upon an account stated could arise upon the approval of such a schedule, for it involved no rendition of an account to the taxpayer and no implied promise that the

schedule approved by the Commissioner was correct or that the United States would pay the amounts shown upon the schedule as overpayments.

If approval of the schedule of refunds and credits could be regarded as constituting a statement of an account, there could be no recovery here, because the petitioner failed to file a claim for refund within five years after the return was due, as required by Section 252 of the Revenue Act of 1921. That Act limited the authority of the Commissioner to allow refunds after five years in the absence of a claim for refund, and forbade the payment of such refunds after that time. Payment of a refund is made if liability upon an account stated is enforced after the five-year period has elapsed, and the fiscal necessities of the Government, upon which the system of refund claims is in part based, require that provisions for claims for refund should be strictly enforced. The petitioner filed no claim for refund within the five-year period, and, therefore, is not entitled to recover.

ARGUMENT

I

THE PETITIONER DID NOT PLEAD AN ACCOUNT STATED

While the court below held that there was no basis for recovery on the theory of account stated, it also pointed out that the petition in that court failed to plead a cause of action based upon an account stated (R. 18, 25). Petitioner now asserts

that when the Commissioner approved the schedule of refunds and credits on March 29, 1924, an account was stated between the parties, and there arose an implied promise to pay to petitioner the sum of $13,502.90, of which he is now entitled to recover $2,628.26, the amount of the overassessment for 1919. We believe that upon the merits there was no basis for recovery on the theory of an account stated, but before coming to the merits we will consider the pleading.

The petition alleged (R. 3–4) that without warrant of law $13,502.90 of an overpayment allowed by the Commissioner had been credited against the additional 1917 tax of the partnership of Westheimer & Daube and asserted that such application was illegal because the statute of limitations had run against the assessment and collection of the partnership tax. The petition alleged that after March 29, 1924, the Commissioner found that the petitioner had overpaid his taxes by $24,780.14 for the year 1918 (R. 3). It was further alleged that this overpayment had been applied against additional taxes assessed against the petitioner for the years 1916 and 1917 (R. 3) and that this was unlawful. Petitioner alleged the application on August 7, 1924, by the collector of a check for $13,502.90 against the additional tax of the partnership for the year 1917 and a copy of a letter from the Treasury Department to the collector authorizing such

application dated July 28, 1924, was appended to the petition. There was no allegation that a certificate of overassessment had been issued (see *Bowcit Teller & Co.* v. *United States,* 283 U.S. 258), nor that by any action of the Commissioner or others an account had been stated to the petitioner on March 29, 1924. It is apparent that the cause of action alleged in the petition and the facts stated were designed to establish only that credit of the overassessment against the partnership deficiency was illegal because the statute of limitations had run against the collection of partnership taxes.

While recovery on the theory of account stated was asked at the argument, recovery could only be had on the facts pleaded. Judgment could not be based upon new grounds presented for the first time in argument. *Clark* v. *United States,* 95 U.S. 539, 543; *Electric Boat Co.* v. *United States,* 66 C.Cls. 333, 377; *Brown* v. *United States,* 1 C.Cls. 377. See also *Merritt* v. *United States,* 267 U.S. 338, 341. While special rules of pleading do not obtain in the Court of Claims (*Wisconsin Central Railroad Co.* v. *United States,* 164 U.S. 190, 212), the rules of the court require that the petition must contain a plain statement of the facts upon which recovery is sought (R. 7), and Section 156 of the Judicial Code bars any claim " unless the petition setting forth a statement thereof " is filed within

six years. No amendment of the pleadings was asked or permitted by the court and in its opinion the Court said in effect that the pleadings did not raise the issue of an account stated.

Insistence upon proper pleading in such a case as this does not involve emphasis on mere form. It is apparent that the Commissioner's approval of the schedule of refunds and credits, upon which petitioner relies as an account stated, was due to a mistake. This is indicated in the opinion of the court below (R. 14, 15, 23, 24). There is, however, no finding that the Commissioner's action was due to mistake. Where a claim is based upon an account stated, it may be resisted by proof of fraud or mistake. *United States* v. *Kaufman*, 96 U.S. 567; *United States* v. *Savings Bank*, 104 U.S. 728. The absence of a finding that the approval of the schedule of refunds and credits was due to mistake seems clearly to be due to the fact that when the proofs were submitted the case was not tried on the theory of an account stated.[1] Thus the Government was deprived of a defense which it was entitled to make by the deficiencies of the petition and they ought not now to be disregarded. Accordingly, we submit that, since petitioner failed to plead any facts designed to raise an issue as to the existence of an account stated, the question should not be considered on the merits in this case.

[1] The decision of the Court in *Bonwit Teller & Co.* v. *United States*, *supra*, was not rendered until after proofs in the instant case were completed.

II

THERE WAS NO ACCOUNT STATED UPON WHICH RECOVERY COULD BE PREDICATED

Petitioner asserts that he is entitled to recover in this case upon an account stated and relies principally upon the decision in *Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, *supra*. In that case an informal claim for refund had been filed which the Commissioner regarded as sufficient, and a certificate of overassessment had been delivered to the taxpayer within six years from the commencement of the action. This Court held that the Commissioner's action in accepting the informal claim for refund as sufficient was binding on the United States, that such claim would have authorized him to make the refund voluntarily, and that Section 3226 did not bar the suit upon the certificate of overassessment as an account stated. The taxpayer had properly pleaded an account stated arising from delivery of the certificate.

We believe that the *Bonwit Teller* case is clearly distinguishable and that the court below correctly held that it furnished no ground for recovery in this case. No formal or informal claim for refund was timely filed in the instant case. Furthermore there was no proof that a certificate of overassessment was ever delivered to the petitioner. So far as appears none was delivered. The issuance of such a certificate was not pleaded nor was it found by the court below. We believe that under the *Bon-*

wit Teller decision there can be no recovery of taxes overpaid on an account stated against the United States except upon a certificate of overassessment which has been delivered to the taxpayer. The *Bonwit Teller* case has been so interpreted by the Circuit Court of Appeals for the Third Circuit. *W. J. Friday & Co.* v. *United States,* 61 F. (2d) 370.

The delivery to the taxpayer of a certificate of overassessment as a prerequisite to recovery on the theory of account stated is required by familiar common-law principles upon which such an action is founded and the necessity of such delivery as a foundation for the action is demonstrated by consideration of the function of a certificate of overassessment in the administration of the revenue laws.

An account stated is a contract, "a promise by a debtor to pay a stated sum of money which the parties had agreed upon as the amount due." *Williston on Contracts,* Sec. 1862; *Middeditch* v. *Ellis,* 2 Exch. 623. The element of agreement between the parties is essential to the creation of an account stated. *Rodkinson* v. *Haecker,* 248 N.Y. 480, 484–485; *Chinn* v. *Lewin,* 16 F. (2d) 512, 515 (App. D.C.); *Wilbur* v. *Win,* 89 N.J. Eq. 278, 282; *A. Krolik & Co.* v. *Ossowski,* 213 Mich. 1, 7, 8; *Barton Cotton Co.* v. *Vardell,* 217 Mo. App. 691, 702; *Lockwood* v. *Thorne,* 18 N.Y. 285, 288; *Gardner* v. *Watson,* 170 Cal. 570, 574. Thus an account does not

become stated merely upon its being rendered, but it must be assented to by the party receiving it, be he the debtor or the creditor. *Toland* v. *Sprague,* 12 Pet. 300, 335. It follows, therefore, that it is necessary that the statement of the account be communicated in some way or submitted by one party to the other. *Nutt* v. *United States,* 125 U.S. 650, 655; *Joshua Hendy Iron Works* v. *Brenneman,* 185 Fed. 183 (C.C.S.D.N.Y.). An uncommunicated acknowledgment of liability cannot be the basis of an account stated. *Parker* v. *Merchants & Insurance Reporting Co.,* 44 Cal. App. 214. The communication or submission may take the form of a statement of account and demand by the creditor, or it may be a rendition of account by the debtor to the creditor (*Williston on Contracts,* Sec. 1863), but it is obvious that it must take one or the other form before agreement upon the account is possible. *Parker* v. *Merchants & Insurance Reporting Co., supra.*

The procedure for the official determination and announcement of overassessments under the Revenue Acts is fully set forth in the opinion of this Court in *United States* v. *Swift & Co.,* 282 U.S. 468, 471–473. As there indicated, the action of the Commissioner in preparing a schedule of overassessments and certificates thereof, the transmission of such schedules and certificates to the collector, their return with appropriate notations thereon to the Commissioner, and the Commissioner's action

in approving the schedule of refunds and credits are all preliminary intra-departmental steps which precede the issuance to the taxpayer of a certificate of overassessment. As the Court said in the *Swift* case (p. 473): "The first official notification which the taxpayer received as to how his account had been handled with respect to abatement, credit, refund and interest was the certificate of overassessment which accompanied the check for the payment due him, if any." It was further pointed out that if no check accompanied the certificate, the certificate of overassessment as issued bore notations showing the credits which had been made.

Thus, since the essential basis of liability upon an account stated is the agreement of the parties upon the account, it is only the final action of the officers charged with the administration of the revenue laws which could constitute the agreement on the part of the United States to the account as prepared and rendered by such officers. Only the certificate of overassessment when actually issued could constitute the communication of this account to the taxpayer. Thus, under the practice in the administration of the revenue laws, we believe that a certificate of overassessment actually delivered to the taxpayer is the only statement of an account which can give rise to a cause of action upon an account stated.

The petitioner contends that recovery may be had, although no certificate of overassessment was

issued, on the theory that the Commissioner's final action was taken when he approved the schedule of refunds and credits on March 29, 1924. But, as indicated in the opinion of the Court in the *Swift* case, this action of the Commissioner was not, under the Bureau practice, communicated to the taxpayer. No implied agreement thereon could arise until such communication, and no communication occurred until a certificate of overassessment reflecting the Commissioner's action was actually delivered to the taxpayer. There was still a possibility that the Commissioner's action might be revised. See *Lewis* v. *Reynolds,* 284 U.S. 281, 283; *United States* v. *Memphis Oil Co.,* No. 308, October Term, 1932, decided January 9, 1933. *Burnet* v. *Porter,* 283 U.S. 230; see also *Botany Mills* v. *United States,* 278 U.S. 282. The right of the Commissioner to reconsider his action and make a further assessment has been upheld even after a refund is paid. *Austin Co.* v. *Commissioner,* 35 F. (2d) 910 (C.C.A. 6th), certiorari denied, 281 U.S. 735; see also *Ridgway* v. *United States,* 18 C. Cls. 707.

The only communication received by the petitioner containing any reference to the amount in suit was a letter dated November 10, 1923, notifying the petitioner of overassessments for the years 1918 and 1919, amounting to $24,780.14. This was the usual "thirty-day" letter. Its terms did not indicate that it represented the final action of the Treasury Department, but on the contrary clearly

showed that it was not definitive. Obviously such a letter cannot be regarded as a final statement of the account between a taxpayer and the United States which gives rise to an implied promise which may be enforced. *Phillipsborn* v. *United States*, 72 C. Cls. 545, certiorari denied, 285 U.S. 548.

The impossibility of regarding any official action short of the actual issuance of the certificate of overassessment as such final action of the officers of the United States that an account stated arises, is demonstrated by the course of events in this case. In connection with the schedule of refunds and credits which the Commissioner approved on March 29, 1924, he authorized payment to the petitioner of the amount shown by the schedule to be refundable, although at that time there was on file an agreement authorizing the application of petitioner's overpayment for 1918 to the additional assessment against the partnership. Pursuant to the authorization so given, a check was issued and forwarded to the collector for delivery to the petitioner (R. 10). The collector, however, returned the check without delivering it, and, recognizing his mistake, the Commissioner on July 28, 1924, instructed the collector to apply the amount of the overpayment to the partnership tax liability. If the Commissioner's action in approving the schedule of refunds and credits is to be regarded as an account stated, giving rise to an implied promise by the United States to pay the amount shown thereon, the

Commissioner is denied the opportunity to correct such mistakes, although the taxpayer has not been notified of the Commissioner's original or subsequent action. It is not a sufficient solution of this difficulty to say that in an action on account stated, based upon such a schedule, the United States could prove the mistake and thus avoid liability, because this involves an assumption of a burden of proof on the part of the United States which it should not be required to bear. Such mistakes are always subject to correction while the matter remains in the hands of the administrative officers and before final and official notification to the taxpayer and possibly afterwards. At least until such notification, the taxpayer has received no promise, express or implied, based upon the verity of the account.

The cases upon which petitioner relies to establish that the common-law rules as to liability on accounts stated are relaxed in such cases as this are clearly distinguishable. In *United States* v. *Kaufman*, 96 U.S. 567, a claim was presented and allowed, and the claimant was notified of the allowance, thus establishing an account which both parties agreed was correct. See *Kaufman* v. *United States*, 11 C.Cls. 659, 662. In *United States* v. *Savings Bank*, 104 U.S. 728, there was an appeal to the Commissioner which the Commissioner allowed and certified for payment. Apparently the certificate was issued to the taxpayer and payment was refused

by an accounting officer. Thus the certificate there held to give rise to a liability on an account stated was similar to a certificate of overassessment issued to a taxpayer. In *First National Bank of Greencastle* v. *United States,* 15 C.Cls. 225, the Commissioner took final action and issued his certificate for payment, payment being refused by an accounting officer. In all of these cases the official charged with the duty of passing on the claim took final action and payment was arbitrarily refused by accounting officers of the Government. Thus, in effect, the accounting officers acted in derogation of the authority of the officers charged with responsibility for determining whether refund should be made, although no appeal by the United States from the action of such officer was provided. The distinction between such cases and cases where the Commissioner retains control and may change his decision is clear. See *Ridgway* v. *United States,* 18 C.Cls. 707, *supra.* As in the *Ridgway* case, here the Commissioner himself has undertaken to correct a mistake, before any notification of his action was given to the petitioner, and before the matter had passed from the Commissioner's control.

Cases which recognize that for some special purposes the Commissioner's action on the schedule of refunds and credits constitutes his final administrative act where the date of his final action determines the commencement of periods of limitation

or the commencement of interest, are not in point. *United States* v. *Swift & Co.*, 282 U.S. 468, *supra; Girard Trust Co.* v. *United States*, 270 U.S. 163; see *Colgate-Palmolive-Peet Co.* v. *United States*, 58 F. (2d) 499 (C.Cls.). Those cases do not involve actions upon accounts stated and do not suggest any reason for the relaxation of common-law rules relating to accounts stated. While the decision in *Bonwit Teller & Co.* v. *United States, supra*, sustained an action upon an account stated against the United States, where there had been compliance with the statutes with respect to claims for refund, and where there had been delivery to the taxpayer of a certificate showing final action and the conclusion that the tax had been overpaid there is no justification for extending that ruling to a case like this in which there is nothing to support an account stated. Accordingly, we think the court below correctly denied recovery.

III

IF AN ACCOUNT STATED HAD BEEN PLEADED AND PROVED, NO RECOVERY COULD BE ALLOWED BECAUSE NO CLAIM FOR REFUND WAS FILED WITHIN THE STATUTORY PERIOD

If the Commissioner's action in approving the schedule of refunds and credits could be regarded as the statement of an account upon which action could be brought, we believe that the petitioner must necessarily fail because he did not file a claim for refund within the time prescribed in Section

252 of the Revenue Act of 1921[2] (*infra*, p. 29). So far as now material, that section provides:

> That if, upon examination of any return of income * * * it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer; *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer. * * *

Section 3228 of the Revised Statutes, as amended by Section 1316 of the Revenue Act of 1921 (*infra*, p. 31), provided that all claims for refund or credit of taxes erroneously or illegally assessed or collected must be presented to the Commissioner of Internal Revenue within four years after payment.

Section 252, *supra*, permits the Commissioner to refund voluntarily any excess in taxes paid, provided such refund is actually made within five

[2] Substantially similar provisions are contained in the later Revenue Acts. Section 281, Revenue Act of 1924, 43 Stat. 253; Section 284, Revenue Act of 1926, 44 Stat. 9; Section 322, Revenue Act of 1928, 45 Stat. 791; Section 322, Revenue Act of 1932, 47 Stat. 169.

years from the date when the return was due. But it is our contention that, unless such refund is made within that period, no refund can thereafter be made voluntarily or ordered by any court, unless a claim for refund was filed within the five-year period, and that such prohibition applies to an action brought upon an account stated as fully as it does to any other remedy against the Government.

The petitioner filed no claim for refund of any part of his 1919 taxes within five years after the return was filed. The only claim for refund relating in any way to 1919 taxes ever filed by him was filed on February 26, 1930 (R. 11), which was almost ten years after the return for 1919 was due. Even then the petitioner filed no separate claim for refund for the year 1919, but the amount of the overassessment for 1919, $2,628.26, was included in the figure stated in the refund claim for 1918.

Section 252 of the Revenue Act of 1921, *supra*, precisely defines the circumstances under which refunds may be made and limits the authority of the Commissioner and the courts to dispose of revenues of the United States already collected. The provision before the first proviso in that section deals with administrative refunds, that is, those which may be determined and made by the Commissioner voluntarily. See *Fox* v. *Edwards*, 287 Fed. 669 (C.C.A. 2d); *J. H. Williams & Co.* v. *United States*, 46 F. (2d) 155 (E.D.N.Y.); cf. *Lucker* v. *United States*, 53 F. (2d) 418 (C.Cls.).

The proviso, however, specifically limits his authority to allow or make such refunds after five years from the date the return was due to cases where a claim for refund has been filed within that period. The prohibition of the statute is not limited to the allowances made after five years, but the making of refunds is also prohibited. This prohibition, we believe, is absolute and applies to all cases, including those in which allowance occurs within the five-year period. The distinction between purely administrative remedies, where the rights which administrative officers may recognize are non-justiciable, and cases where the courts may intervene, has often been recognized in connection with the revenue laws. See *Chesebrough* v. *United States*, 192 U.S. 253, 263–264; *Williamsport Wire Rope Co.* v. *United States*, 277 U.S. 551; *Heiner* v. *Diamond Alkali Co.*, Nos. 476 to 478, October Term, 1932, decided March 13, 1933.

We believe that it is clear under Section 252 that, in the absence of a claim for refund filed within five years after the return was due, the Commissioner would be without authority after that time to allow a refund and issue a certificate of overassessment upon which an action could be maintained against the United States as upon an account stated. Such a certificate, if issued, would be a nullity. Upon the same reasoning, a certificate of overassessment issued before the expiration of the

five-year period could not be the basis of action against the United States in a suit brought after the five-year period, unless a claim for refund had been filed within five years. If an action might be maintained upon such a certificate and recovery allowed, a refund would be "made after five years from the date when the return was due", but this the statute prohibits. The fact that suit on an account stated is predicated on the Commissioner's determination as evidenced by the certificate prevents the statute of limitations applicable to suits for the recovery of taxes illegally collected (R.S. Sec. 3226) from applying (*Bonwit Teller & Co.* v. *United States, supra*), but recovery in such a suit is certainly the recovery of taxes shown on the certificate as overpaid and thus involves the making of a refund.

The view that any refund made after the five-year period without a claim for refund is unauthorized finds support in the provisions of Sections 608 and 610 of the Revenue Act of 1928 (*infra*, pp. 32–33), which provide that if the Commissioner makes a refund which is erroneous because made "after the expiration of the period of limitation for filing claim therefor", the United States may recover the amount of such refund under Section 610. If, as we contend, no action could be maintained on a certificate, where no claim for refund was filed within five years, none could be maintained on

the intermediate action of the Commissioner in approving the schedule of refunds and credits.

The reason for the first proviso in Section 252 is clear. The requirement of claims for refund is an essential part of the system for administration of the revenue laws. Not only are such claims required by Section 252, but they are also required by Section 1316, amending Section 3228 of the Revised Statutes, and no suit may be maintained under Section 3226 of the Revised Statutes, as amended by Section 1318 of the Revenue Act of 1921, unless a claim for refund or credit has been duly filed. While the purpose of requirements that such claims must be clear and explicit is to enable the administrative officers to make prompt disposition thereof (see *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U.S. 269), the purpose of requiring such claims and that they shall be filed within a limited time is to protect the Federal revenues. See I.T. 1742, II–2 C.B. 229. When the time has expired, the revenues are beyond the reach of any taxpayer or any officer of Government.

The fiscal necessities upon which the system of requiring claims for refunds has been erected are not affected by the form of action which a taxpayer may bring to recover sums out of the Treasury. The requirement of a claim for refund is an essential prerequisite to suit under Section 3226 of the Revised Statutes. There is no reason for disre-

garding the same necessity for a claim for refund where the taxpayer relies on an account stated. Section 252 applies, we believe, to refunds sought on that theory as well as to those sought on any other. It is no more harsh to apply Section 252 to a taxpayer who has received notice that he has overpaid his tax through the allowance of a refund and deny recovery than it is to apply Section 3226 to deny recovery to another who also overpaid but whose claim was not allowed. Cf. *Ritter* v. *United States*, 28 F. (2d) 265 (C.C.A. 3rd). In both cases the Government retains funds to which it would not have been entitled if the taxpayers had acted promptly. But this is the system which Congress has established to guard the revenues, and the necessity of filing claims has been so long a familiar duty of taxpayers who seek redress that it should not be dispensed with here any more than where a taxpayer sues under Section 3226.

The petitioner apparently contends that the decision of this Court in *Bonwit Teller & Co.* v. *United States*, 283 U.S. 258, authorizes actions against the United States on accounts stated in the absence of a claim for refund filed in time. We find no basis for this interpretation of the decision. In the *Bonwit Teller* case the Court held that when an informal claim for refund had been accepted by the Commissioner, its informality could not be questioned by the United States, and the Commissioner,

having accepted such a claim, would be authorized to make refund voluntarily. It further held that where, after such an informal claim had been filed in time, a certificate of overassessment had been delivered to the taxpayer, an action on an account stated might be maintained upon such certificate, and that, in such an action, the statute of limitations as to actions under Section 3226 of the Revised Statutes, was inapplicable. The Court said (p. 264):

> The question here is to be distinguished from that which would have arisen if, contrary to the taxpayer's insistence, the Commissioner had held that what was done did not constitute a filing of a claim.

In the case suggested the Commissioner's determination that an informal claim was inadequate and could not be considered would, if the Commissioner was justified in rejecting the claim as inadequate, be the precise equivalent of a case where no claim was filed within the statutory period. Thus, we believe that in the *Bonwit Teller* case the Court left open and did not decide whether an action on account stated might be maintained if no timely claim for refund was filed.

So far as we know, the only decision dealing with the necessity for a claim for refund, where action is brought on the theory of account stated, is *W. J. Friday & Co.* v. *United States*, 61 F. (2d) 370 (C.C.A. 3d), where, without extended discus-

sion, the court held that in such a suit a claim for refund was unnecessary. We believe that this conclusion was erroneous, in view of the provisions of Section 252 of the Revenue Act of 1921. The question was left open in *Philipsborn* v. *United States,* 72 C.Cls. 545, certiorari denied, 285 U.S. 548, but there are indications in the opinion that the court considered a claim for refund to be necessary. In the present case, the court below held that there was no account stated, and that there could be no recovery in the absence of a claim for refund.

The paucity of decisions on the question may well be due to the fact that prior to the decision of this Court in the *Bonwit Teller* case it was generally assumed that all actions to recover taxes illegally assessed and collected should be brought under Section 3226 of the Revised Statutes, and the action upon an account stated, which had been recognized in several early decisions, had apparently not been resorted to for many years. Since the *Bonwit Teller* decision, it has been urged in the Court of Claims in a number of cases that recovery may be predicated upon an account stated in cases where the failure of the taxpayer to protect his rights would otherwise require denial of recovery. The Court of Claims has not, so far as we are aware, allowed recovery in any case based upon an account stated where a timely claim for refund was not filed. It seems reasonable to suppose that the ques-

tion will be presented with recurring frequency until the precise limitations of the rule announced in the *Bonwit Teller* case are defined by this Court.

CONCLUSION

The judgment of the court below was correct and should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

WHITNEY NORTH SEYMOUR,
JOHN MACC. HUDSON,
Special Assistants to the Attorney General.

WILLIAM W. SCOTT,
J. R. FILLMAN,
Attorneys.

April, 1933.

APPENDIX

STATUTE INVOLVED

REVENUE ACT OF 1921, C. 136, 42 STAT. 227, 268, 314

SEC. 252:

That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes", the Revenue Act of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided*, That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further*, That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the Revenue

Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further,* That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (*a*) of section 14 of the Revenue Act of 1916, or filed prior to the passage of this Act under section 252 of the Revenue Act of 1918.

Section 1315 (U.S.C., Title 26, Sec. 149):

That section 3220 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor,

assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

Section 1316 (U.S.C., Title 26, Sec. 157):

That section 3228 of the Revised Statutes is amended to read as follows:

"SEC. 3228. All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."

This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.

Section 1318 (U.S.C., Title 26, Sec. 156):

That section 3226 of the Revised Statutes is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commis-

sioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum."

This section shall not affect any suit or proceedings instituted prior to the passage of this Act, but shall apply to all suits and proceedings instituted after the passage of this Act, whether or not barred by prior Acts of Congress.

Sections 608 and 610 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provide:

> SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.
>
> A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—
>
> (a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or
>
> (b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—
>
> (1) within such period suit was begun by the taxpayer, or
>
> (2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limita-

tions for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U.S.C. Sup. VI, Title 26, Sec. 1674.)

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U.S.C. Sup. VI, Title 26, Sec. 1646.)

U. S. GOVERNMENT PRINTING OFFICE 1933